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No.

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

BRAJ NANDAN SINGH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April, 1987

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QUESTIONS PRESENTED

1. Whether the "controlled delivery" of lawfully seized crates containing narcotics permits the warrantless entry and search of premises to which the crates are delivered?

2. Whether error in the admission of such evidence can be harmless beyond a reasonable doubt where the prosecution, in countering petitioner's sole defense, relied on the presence of the narcotics on petitioner's premises to prove knowing possession?

3. Whether the trial court's insistence that petitioner testify prior to other defense witnesses violated the rule embodied in *Brooks v. Tennessee*, 406 U.S. 605 (1972)?

TABLE OF CONTENTS

Page

Questions Presented i

Table Of Authorities iv

Opinions Below 2

Jurisdiction 2

Constitutional And Statutory Provisions Involved 2

Statement Of The Case 3

The District Court's Ruling On The Motion To Suppress 5

The Trial Court Insists That Petitioner Testify Before Other Defense Witnesses 7

The Second Circuit's Split Decision 10

Reasons For Granting The Writ 11

I

The warrantless entry into and search of a warehouse, even if the intrusion is minimal, is not saved from illegality by a prior lawful seizure and "controlled delivery." 11

Certiorari Has Been Granted In *Carter v. United States,* Involving The Warrantless Entry Of A Warehouse 14

II

Error in admission of the narcotics seized in the warehouse cannot be harmless beyond a reasonable doubt because the prosecutor, in countering petitioner's sole defense, relied on the presence of narcotics on petitioner's premises to prove knowing possession 15

TABLE OF CONTENTS—Continued

Page

III

The trial court's insistence that petitioner testify prior to other defense witnesses violated the rule embodied in *Brooks v. Tennessee*, 406 U.S. 605 (1972) 17

Conclusion 22

Appendix

Opinion Of The United States Court Of Appeals For The Second Circuit ..... App. 1

Opinion Of The United States District Court For The Eastern District Of New York ..... App. 25

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Hicks, No. 85-1027, 55 U.S.L.W. 4258 (U.S. March 3, 1987) 13, 14

Brooks v. Tennessee, 406 U.S. 605 (1972) 17, 18, 19, 20

Carter v. United States, No. 86-1016, 55 U.S.L.W. 3607 (U.S. March ?, 1987) 14, 15

Chapman v. California, 386 U.S. 18 (1967) 17

Geders v. United States, 425 U.S. 80 (1976) 19

Illinois v. Andreas, 463 U.S. 765 (1983) 11, 12, 13, 16

United States v. Cronic, 466 U.S. 648 (1984) 18

United States v. Moscatiello, 771 F.2d 589 (1st Cir. 1985) 14

STATUTES AND RULES

Fed. R. Evid. 104(b) 21

MISCELLANEOUS

Westen, Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense, 66 Calif. L. Rev. 935, 984 (1978) 18

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Braj Nandan Singh respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on February 9, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, which is currently unreported, is reprinted in the Appendix at App. 1.

The opinion of the United States District Court for the Eastern District of New York, which is unreported, is reprinted in the Appendix at App. 25.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit, affirming the District Court's judgment of conviction, was entered on February 9, 1987. This petition for certiorari is filed within 60 days of the date of that judgment in compliance with Rule 20.1 and 20.4. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioner was convicted after a jury trial of importing, possessing and conspiring to distribute a large quantity of heroin and hashish. The charges arose after a shipment of foodstuffs from India, which was consigned to petitioner's wholesale and retail food business, was discovered by United States Customs agents to contain narcotics. A controlled delivery was then made to petitioner's warehouse. When most of the shipment had been unloaded from the shipping container, federal agents moved in and arrested him. A warrantless search conducted in conjunction with the arrest uncovered, in addition to foodstuffs, hashish and heroin. Prior to trial petitioner moved unsuccessfully to suppress the narcotics seized during the warrantless search.

The contraband had been first discovered during a United States Customs search. In May 1985, a 20-foot long shipping container arrived at Port Newark, New Jersey, from Bombay, India, aboard a ship. The shipment, de-

scribed in the vessel's manifest as containing 258 packages of foodstuffs, was consigned to Little India of Queens, petitioner's company. The shipper was S. V. Exports, Bombay.

After the container had been moved to a terminal in Port Elizabeth, it was routinely searched by Customs officials. The container was packed top to bottom with burlap sacks as well as crates wrapped in the same material. An inspector removed two or three sacks and two crates from the container. The burlap was cut and the crates opened or broken into, revealing foodstuffs. The inspector then crawled into the container.

After cutting into some of the sacks with a probe, he broke into a crate, numbered 73, which was in the middle of the shipment, and pulled out a slab wrapped in tape. When the slab was unwrapped and the substance within field tested, it proved to be hashish. That crate was then removed from the container and opened.

The Customs agent called in Drug Enforcement Agency (DEA) agents who decided to rewrap and replace the opened crates and make a controlled delivery of the resealed container to Little India of Queens. Crate No. 73 was packed upside down when returned to the container so it would appear undisturbed. A trucker drove to petitioner's warehouse in Queens, New York, where he ultimately met petitioner and four workers. Petitioner moved his red van, which had been parked in front of the warehouse to reserve a parking space, to the other side of the street. The trucker pulled in, unhitched the container, opened it, was paid, and left. A convoy of federal agents had followed the truck from New Jersey to the Queens

warehouse. The agents surveilled the unloading for about three hours.

The agents saw petitioner supervising the workers who were unloading the shipment of 258 crates and bags. Most of the crates and bags were being moved into petitioner's warehouse, but nine of them were loaded into his van. When the trailer was 80 to 85 percent unloaded, the agents descended on the scene and arrested petitioner and the workers. One of the agents brought petitioner over to the van and asked him about the packages that had been placed there. Petitioner replied that it was damaged merchandise which he was bringing to his retail store to sell quickly. Eight of the nine packages in the van indeed contained food stuffs. One damaged crate, for example, contained papad, or pita bread. However, another crate, the one numbered 73, contained the slabs wrapped in tape. Petitioner told the agent that he did not know what that merchandise was. The agents then conducted a warrantless search of all 258 crates and bags, including those in the van, those in the warehouse and those still in the trailer.

The District Court's Ruling On The Motion To Suppress

In ruling on petitioner's motion to suppress the narcotics, the district court made findings of fact which included the following:

> Following the arrest, warrantless searches were conducted of the container, the van, and the warehouse. Inside the container the agents found 40 burlap-wrapped wooden crates which were thereafter opened without a warrant. Thirty-nine of these crates were found to contain hashish. One was found to contain 9 kilograms of heroin.

> Inside the van agents discovered 9 crates, one of which was already opened and was observed to contain hashish. Whether the other 8 crates were ever opened is not apparent from the information submitted to the Court by the parties on the motion. Presumably they were, following the seizure of the van and its contents as a result of discovery of its use as a vehicle for transporting narcotics.
>
> The agents also entered the warehouse without a search warrant. The warehouse appeared filled with crates and sacks of which a "majority" were from the container. All of the crates identified as coming from the container were opened without a search warrant. Seventy-five of these crates were found to contain hashish. The balance of some 134 crates were found to contain foodstuffs. (App. 29)

Applying what was in essence an "extended border search" analysis, the district judge ruled that the warrantless search of the trailer was proper. Similarly, he found the search of the van to be lawful on both a theory of "search incident to arrest" as well as the automobile exception to the warrant requirement. (App. 30-31)

The agents' warrantless entry into petitioner's warehouse, however, presented a greater problem. The court acknowledged that petitioner had an expectation of privacy in the premises and that the entry was not justified by exigent circumstances, since all participants in the loading had been arrested and the agents could have effectively prevented the removal of anything from the warehouse while a search warrant was obtained. The court therefore concluded that the agents entry into the warehouse "appears to have been illegal." (App. 32)

Nevertheless, the district judge refused to suppress the evidence seized inside the warehouse, concluding that it was not "obtained as a result of this illegality." The court reasoned that, since the container "in its entirety had already been seized" in conjunction with the Customs search in New Jersey, its contents would inevitably have been inventoried and inspected either "as a matter of causation or application of the inevitable discovery rule." (App. 32)

The Trial Court Insists That Petitioner Testify Before Other Defense Witnesses

At trial defense counsel advised the court that, although petitioner planned to testify in his own defense, counsel planned to call two other witnesses first, an attorney and a DEA agent. The court requested an offer of proof. Defense counsel responded that the DEA agent would testify that petitioner, to demonstrate he had no knowledge whatsoever of the narcotics in the shipment, told the Government, through counsel, every detail known to him regarding the shipment and reported how the attorney, unsolicited, had twice come to the federal detention facility, sent by individuals who paid for his services. The DEA agent would testify that petitioner had on his own initiative given him the name of the man who arranged the importation from India, and that the agent knew this man to be a suspected drug dealer. Counsel pointed out that petitioner's willingness to supply this information to the agent, as well as his offer to give an unrestricted interview and be examined by a polygraph expert, exhibited an innocent state of mind.

After the prosecutor objected to eliciting such evidence from the agent, the court responded:

> I better hear Mr. Singh's testimony first. Then maybe if it's appropriate we'll put on some evidence after that as to the statements.
>
> * * *
>
> I'll take it up after the defendant has testified, when I'll be in a better position to see what first hand information there is.
>
> * * *
>
> We might call Mr. Sharkey [the DEA agent] at some later stage at the trial.

The court recessed for the day and reconvened the next morning. The defense then sought to call the attorney as its first witness. The trial judge, however, interposed:

> THE COURT: I had anticipated that you were going to put your client on the stand to testify as to what he knows of his own personal knowledge, including his contacts, such as they were, with Mr. Nerboso [the attorney], and then we'd hear from the witness if it was necessary to hear from him as to what additional knowledge he might have on the subject.

Counsel protested that "we would prefer the order of proof that we suggested, Your Honor." The court indicated that the attorney's testimony needed some foundation and that the jury might be confused if it did not understand how the testimony fit into petitioner's defense.

Counsel doggedly offered to examine the attorney in the absence of the jury in order to lay a foundation. The judge replied:

> THE COURT: I really don't see how that would assist me. What I need is an understanding of what your client's defense is so that I can weigh the probative value of Mr. Nerboso's testimony against the possibilities of prejudice, and I think both I and the jury would be assisted if we had some understanding of what the defense was, what the background was in the context of which this proof from Mr. Nerboso would be relevant.
>
> So let's proceed with the testimony of the defendant, and then in the light of that testimony I'll rule on the admissibility of these other items of proof.

When counsel again protested that the defense would like to keep their planned order of proof and gave a full proffer of the attorney's anticipated testimony, the court replied:

> THE COURT: You're telling me a great deal about what your client will testify to. I think it's better for me to hear that from the client from the stand and when I've heard it I'll appreciate better whether the probative value of having this lawyer testify outweighs the potential for confusion which would exist by having some collateral matter that simply would distract the jury from its functions. So we'll proceed with the defendant's testimony.

Petitioner took the stand and testified at length. The court then permitted both the DEA agent and the attorney to testify. The agent's testimony was supplemented by a stipulation. The testimony of both witnesses was in substantial conformity with the earlier proffers by defense counsel.

The Second Circuit's Split Decision

On appeal to the United States Court of Appeals for the Second Circuit, petitioner's conviction was affirmed by a two-to-one vote. The majority departed from the district court's search and seizure analysis and held that the agents' warrantless search of the warehouse was not unlawful, essentially because, the majority found, the contraband was located "just inside the open storeroom doors" and, therefore, the agents' intrusion was "minimal." (App. 6) The court also appeared to hold that, because of the initial seizure of the shipment and the agents' close surveillance of its movement, the Government was in continuous constructive possession of it and retaking the warehoused drugs yielded nothing of evidentiary value that was not already in the Government's possession. (App. 5-7) Alternately, assuming the evidence was admitted in violation of petitioner's rights, the majority concluded that the error was harmless because the narcotics lawfully seized from the trailer and van were just as incriminating as those found in the warehouse. (App. 7)

Circuit Judge Kearse, in dissent, disputed the majority's finding that the crates were just at the doorway of the warehouse and noted that this was contradicted by the district court's findings as well as by a DEA agent's affidavit sworn to almost contemporaneously with the search. (App. 11-12) She demonstrated that the search of the warehouse was reasonably thorough. Moreover, even if the intrusion into petitioner's premises were "minimal," she pointed out, there is no Fourth Amendment principle that accepts this as a basis for finding the entry

did not violate petitioner's rights. (App. 13) Since petitioner had a legitimate expectation that no uninvited person would enter his warehouse, Judge Kearse also rejected the notion that the agents maintained constructive possession of the crates once they were moved inside the warehouse. Finally, Judge Kearse reasoned that the erroneous admission of this evidence could not be deemed harmless beyond a reasonable doubt, because the prosecutor, in summation, argued that petitioner's knowledge that the crates contained narcotics, the only issue at trial, was proven by their presence in his warehouse. (App. 23-24)

In regard to petitioner's claim that the district court erred in requiring him to testify before his other witnesses, the Court of Appeals concluded that the judge had merely refused to accept the proffered testimony of those witnesses until a proper foundation was laid, and that it was within his discretion to determine the order in which parties adduce proof. (App. 8-9)

REASONS FOR GRANTING THE WRIT

POINT I

The warrantless entry into and search of a warehouse, even if the intrusion is minimal, is not saved from illegality by a prior lawful seizure and "controlled delivery."

The Court explained the concept of a "controlled delivery" in *Illinois v. Andreas,* 463 U.S. 765 (1983). There federal agents made a controlled delivery of a re-sealed

container after a Customs officer at an airport had found drugs inside it. The container was delivered to Andreas who took it into his apartment. An agent left to secure a warrant to search the apartment. Before the agent was able to obtain the warrant, Andreas left the apartment with the container and was arrested. The container was reopened, and the drugs were seized. The Court held that the warrantless reopening of the parcel following its reseizure did not violate the Fourth Amendment. Had the agents entered and searched Andreas' apartment without a warrant and seized the drugs, surely the Court would not have upheld the search and seizure.

Similarly, the agents' warrantless entry into petitioner's warehouse required suppression of the drugs seized there, notwithstanding any earlier seizure of those drugs at the border. Were *Andreas* given a more capacious interpretation, the discovery of contraband at a border would justify any subsequent invasion of privacy, no matter how remote in time and place. Since the evidence has already been "seized," agents would be free to enter any premises at any time to recover it without a warrant, secure in the knowledge that the evidence can never be suppressed because it had already been seized. The privacy interest thus invaded could never be vindicated nor the agents' illegal conduct deterred.

The problem in such an analysis is that it focuses on the item seized and all but ignores the place searched. Thus it is only a partial analysis. Petitioner does not dispute that the agents could lawfully reopen any crate previously seized at the port. But to do so, the agents would first either have to seize the crate in a public place, as in *Andreas*, or, if the crate were within private premises, to

obtain a warrant to enter and search those premises. Here the agents, unlike in *Andreas,* made no effort to obtain a search warrant for petitioner's premises until they had searched it and seized the crates.

A rule allowing such a warrantless search has no limiting principle. It gives a federal agent carte blanche to roam wherever and whenever he may to reseize the evidence. He is invested with a kind of floating warrant dispensation. He has unfettered discretion. A neutral and detached magistrate need not concern him. We can conceive of no relaxation of the Fourth Amendment's protections that endorses this result. To adopt such a policy is to cut at the heart of that amendment's proscription against warrantless searches of premises in which there is a legitimate expectation of privacy. The evidence seized in petitioner's warehouse should have been suppressed to preserve this privacy interest.

The rationale of the Court of Appeals majority that the intrusion was lawful because "minimal" is reminiscent of the old English case in which the servant girl thought she should be excused for having a baby, because it was such a small one. Recently, in *Arizona v. Hicks,* No. 85-1027, 55 U.S.L.W. 4258 (U.S. March 3, 1987), the Court rejected a suggestion that the search of stereo equipment on less than probable cause should be upheld because it was a "cursory inspection" rather than a "full-blown search." Noting that "[n]othing in the prior decision of this Court supports such a distinction," the Court expressed its unwillingness "to send police and judges into a new thicket of Fourth Amendment law." 55 U.S.L.W. at 4260. "A search is a search," the Court made clear. *Id.* The Sec-

ond Circuit majority's "minimal intrusion" analysis is of a kind with the "cursory inspection" theory rejected in *Hicks*.

The Second Circuit majority's "constructive possession" analysis is similarly flawed. First, once the crates were moved inside the warehouse, the agents lost whatever constructive possession they may have had, since petitioner had a legitimate expectation that no uninvited person would enter his warehouse and the agents therefore had no dominion or control over the crates inside. Second, to establish a rule that agents retain constructive possession over items involved in a controlled delivery would dispense with any warrant requirement for entering premises following such a delivery. Nothing in Fourth Amendment jurisprudence permits such a result.

Certiorari Has Been Granted In Carter v. United States, Involving The Warrantless Entry Of A Warehouse

This Court has recently granted certiorari in *Carter v. United States*, No. 86-1016, 55 U.S.L.W. 3607 (U.S. March 9, 1987), which implicates many concerns similar to those in this case. In *Carter* the United States Court of Appeals for the First Circuit held, *sub nom. United States v. Moscatiello*, 771 F.2d 589 (1st Cir. 1985), that marijuana which was in plain view when police officers made a warrantless entry of a warehouse, and which was later seized pursuant to a warrant, need not be suppressed, because there was no causal link between the officers' illegal entry and discovery of the marijuana and because it was in-

evitable that the marijuana would have been discovered during the subsequent legal search. In the instant case, the district court's ruling permitting admission of the evidence seized inside the warehouse was based on an analysis similar to that engaged in by the First Circuit in *Carter*. The Government's arguments to the district court and to the Second Circuit also invoked theories of admission addressed by *Carter*.

The Court should therefore grant certiorari in this case both to prescribe the limitations on the power of the police to make warrantless entries of premises during controlled deliveries and to conform the result in this case to the Court's ultimate holding in *Carter*.

POINT II

Error in admission of the narcotics seized in the warehouse cannot be harmless beyond a reasonable doubt because the prosecutor, in countering petitioner's sole defense, relied on the presence of narcotics on petitioner's premises to prove knowing possession.

Petitioner testified that he did not know narcotics were in the crates shipped to him and that he had unwittingly been used by others. His defense was plausible, and his testimony was forthright and consistent. To offset this defense, the prosecution argued that approximately 75 crates of hashish were found in petitioner's warehouse. The prosecutor, as he had in his opening, stressed in summation that "most of the stuff is in the storeroom." He asked the jury rhetorically:

> What is his defense? His defense is, well, I didn't know. I didn't know. I have no idea how all of this hashish and heroin got into my shipment.

The prosecutor added:

> Was this hashish going to walk out of this storeroom and go to some other owner? Or . . . maybe somebody was going to break into the storeroom . . . and find the crates and gather them up and run off with them without [petitioner's] knowing?

Had the jury been presented only with evidence that narcotics were found in the container and the van, petitioner's defense that he did not know the shipment contained contraband would certainly have been more forceful and may have carried the day. The presence of one crate of wrapped slabs of hashish in his van had an innocent explanation: that damaged goods could not be stored in the warehouse and were being moved to petitioner's retail store for quick sale. Indeed, since eight of the nine crates and bags found in the van contained nothing but foodstuffs, this explanation was compelling.

As to the presence of the crates of narcotics found unloaded and unopened in the container, petitioner would certainly have had an easier time convincing the jury that he did not know their contents than he did in extending the same argument to the 75 crates already unloaded and moved into his warehouse. The jury may very well have inferred petitioner's knowledge of the nature of the shipment from the fact that he took the crates and stored them in his warehouse. Indeed, this is the very inference that the prosecutor urged the jury to draw. The same jury would be less likely to draw a similar inference from the mere delivery of the shipment to petitioner as consignee. In *Illinois v. Andreas*, 463 U.S. at 73 n. 3, the Court noted: "Of course, the mere fact that the consignee takes possession of the container would not alone establish guilt of

illegal possession or importation of contraband. The recipient of the package would be free to offer evidence that the nature of the contents were unknown to him." Here, the vitality of this very defense was impaired by the evidence of contraband found in petitioner's warehouse. Therefore it cannot be said that the district court's failure to suppress this evidence was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967).

POINT III

The trial court's insistence that petitioner testify prior to other defense witnesses violated the rule embodied in Brooks v. Tennessee, 406 U.S. 605 (1972).

In *Brooks v. Tennessee*, 406 U.S. 605 (1972), the Court held that "the accused and his counsel may not be restricted in deciding whether, and when in the course of presenting his defense, the accused should take the stand," *id.* at 613. In *Brooks*, a Tennessee statute required that a defendant testify before any other defense witnesses or not at all. The Court held that, since "as a matter of professional judgment his lawyer might want to call him later in the trial," the statute "deprived [the accused] of the 'guiding hand of counsel' in his timing of this critical element of his defense." *Id.* Brook's armed robbery conviction was therefore reversed.*

In the instant case defense counsel told the trial court that, although petitioner planned to testify in his own de-

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* The *Brooks* court also held that the Tennessee procedure infringed on the defendant's privilege against self-incrimination. 406 U.S. 609-612.

fense,** counsel would call two other witnesses first. The court ultimately directed that petitioner take the stand before those witnesses. After petitioner testified, the prosecutor had no objection to the other witnesses' testifying.

The trial judge's ruling denied petitioner his right to due process and effective assistance of counsel, as well as his right against self-incrimination. The right of the defense to determine if and when the defendant should testify is fundamental. In *United States v. Cronic*, 466 U.S. 648, 659 n. 25 (1984), the Court cited *Brooks v. Tennessee* as a circumstance where 'prevent[ing] counsel from assisting the accused during a critical stage of the proceeding'' is ''constitutional error without any showing of prejudice.'' The conclusion that prejudice need not be shown is a compelling one because ''the order of proof has an important effect on the outcome of criminal cases, and . . . the right of the defendant to present a defense through witnesses includes the right to present their testimony in an order that will render it effective.'' Westen, Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense, 66 Calif. L. Rev. 935, 984 (1978). Obviously, a defendant is put in a worse position when he is forced ''to subject himself to impeachment and cross-examination at a time when the strength of his other evidence is not clear.'' *Brooks v. Tennessee*, 406 U.S. at 612.

**A necessary implication of *Brooks v. Tennessee* is that a defendant may not constitutionally be forced to decide whether he will testify at any point before the close of his defense. The testimony of other defense witnesses could change defendant's decision to testify. Thus, petitioner was not irrevocably bound by counsel's representation that he would testify.

The Second Circuit, in concluding that the trial judge merely refused to accept the proffered testimony of other witnesses until a proper foundation was laid—ostensibly as an aid in determining whether the first witness' testimony would be hearsay and the second witness' testimony sufficiently probative—held that the applicable rule was that set forth in *Geders v. United States*, 425 U.S. 80 (1976). There the Court stated that the "trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process. To this end he may determine generally the order in which parties adduce proof." *Id.* at 86. But this rule must be read together with the rule in *Brooks*, where the Court stated:

> While nothing we say here otherwise curtails in any way the *ordinary* power of a trial judge to set the order of proof, the accused and his counsel *may not be restricted* in deciding whether and when in the course of presenting his defense, the accused should take the stand.

406 U.S. at 613 (emphasis added). Thus, not every evidentiary issue can be used as justification for requiring the defendant to testify first. The clear import of *Brooks* is that a defendant's constitutional right to time his testimony cannot be overriden by anything less than a substantial countervailing interest. In *Brooks* the Court recognized a state's interest in preventing testimonial influence, yet held that it did not regard that interest as sufficient to overcome the defendant's right. 406 U.S. at 611. If every colorable evidentiary consideration were sufficient to subvert that right, it would cease to exist.

Here, the proffered testimony of the two witnesses was not facially inadmissible. At most, the judge had

some reservations about it. For example, he characterized the attorney's prospective testimony as "not very impressive" and speculated that there might be "some confusion" if the jury were to hear that testimony without understanding how it fit into "the full factual picture of the case." These slight misgivings simply do not reflect a concern with such substantial questions of admissibility as might arguably justify tampering with the timing of a defendant's testimony.

Requiring petitioner to testify first, so that the court could better assess the relevancy and gauge the probative value and prejudice of other witnesses' testimony, is an unsound principle. First, a court's ability to determine relevancy, probative value and prejudice of defense witness testimony would *always* be enhanced if the defendant testified first. Such a facile justification would, therefore, always defeat the *Brooks* rule and render it meaningless. Second, as previously noted, in *Brooks* the Court acknowledged that the Tennessee statute did serve a legitimate purpose, namely, "a state interest in preventing testimonial influence." 406 U.S. at 611. Nevertheless, the Court held that the state's interest was "not . . . sufficient" to justify its effect on the constitutional right of the defendant. *Id.*

Third, the asserted evidentiary objectives could easily be accomplished by less restrictive means. There were alternatives available to the district court which were less drastic than forcing the defendant to testify before his other witnesses. A viable alternative was the one actually presented in this case: a detailed proffer of the witnesses' testimony, together with a proffer of the defendant's prospective testimony. Here, even the trial judge ad-

mitted to counsel that "you're telling me a great deal . . . about what your client will testify to." Thus the court had an adequate background to allow the other witnesses to testify and, upon proper objection by the prosecutor, to make evidentiary rulings during their testimony. Another alternative, one actually suggested by defense counsel, was that the judge first hear the witnesses testify without the jury present. Since, after petitioner testified, the prosecutor had no objection to the other witnesses' testifying, hearing their testimony earlier outside the jury's presence could have been sufficient to overcome what were in reality insubstantial objections. Finally, the court could have taken their testimony "subject to connection," and struck it if petitioner's subsequent testimony did not support its admissibility. *See* Fed. R. Evid. 104(b).

The procedure imposed by the trial judge, when less drastic means were available, unnecessarily abridged petitioner's right to control the timing and sequence of his defense. The Court should therefore grant certiorari to decide under what circumstances, if any, a trial court may direct a defendant to testify before other defense witnesses.

———o———

CONCLUSION

The Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit should be granted.

Dated: New York, New York
April 3, 1987

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1248—August Term, 1985

(Argued: May 8, 1986 Decided: February 9, 1987)

Docket No. 86-1075

UNITED STATES OF AMERICA,

Appellee,

— v. —

BRAJ NANDAN SINGH,

Defendant-Appellant.

Before:

VAN GRAAFEILAND, KEARSE and MINER,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York convicting appellant after a jury trial before Judge Sifton of importing, possessing and conspiring to distribute substantial quantities of heroin and hashish. Affirmed.

GREGORY J. O'CONNELL, Assistant United States Attorney, Brooklyn, New York (Reena Raggi, United States Attorney for the Eastern District of New York, Allyne R. Ross, Assistant United States Attorney, Brooklyn, New York, of Counsel), *for Appellee.*

HERALD PRICE FAHRINGER, New York, New York (Diarmuid White, New York, New York, of Counsel), *for Defendant-Appellant.*

VAN GRAAFEILAND, *Circuit Judge:*

Braj Nandan Singh appeals from a judgment of the United States District Court for the Eastern District of

New York convicting him after a jury trial before Judge Sifton of importing, possessing and conspiring to distribute substantial quantities of heroin and hashish. Appellant contends that the district court committed reversible error in denying his motion to suppress evidence concerning seized narcotics and also made several erroneous procedural and evidentiary rulings. Finding no merit in these contentions, we affirm.

This litigation centers on a twenty-foot shipping container consigned to appellant's company, Little India of Queens, which arrived aboard ship at Port Newark, New Jersey in May 1985. The customs Inspector who checked the contents of the container found that they consisted of burlap bags and crates wrapped in burlap. Although the shipping documents indicated that the container held 258 packages of foodstuffs, inspection of a bag selected at random disclosed that it was filled with hashish.

Because the customs officials were not then in a position to arrest anyone as the possessor or owner of the illegal shipment, *see United States v. Issod,* 508 F.2d 990, 993 (7th Cir. 1974), *cert. denied,* 421 U.S. 916 (1975), they decided to attempt a "controlled delivery" of the shipment to the named consignee or whoever purported to act as such. The purpose and mechanics of a controlled delivery are described in *Illinois v. Andrews,* 463 U.S. 765 (1983) as follows:

> The lawful discovery by common carriers or customs officers of contraband in transit presents law enforcement authorities with an opportunity to identify and prosecute the person or persons responsible for the movement of the contraband. To accomplish this, the police, rather than simply seizing the contraband and destroying it, make a so-called controlled

> delivery of the container to its consignee, allowing the container to continue its journey to the destination contemplated by the parties. The person dealing in the contraband can then be identified upon taking possession of and asserting dominion over the container.

Id. at 769 (footnotes omitted).

In keeping with the concept of what is in effect a quasi or restricted delivery, the customs officials turned over the container to the trucking company hired by appellant, and then, with the assistance of Drug Enforcement Administration (DEA) agents, kept the container under close surveillance until it arrived in front of a small storeroom maintained by appellant in a building in Queens, New York. Appellant and four workmen under his supervision then began to unload the packages from the container, placing some of them in a van owned by appellant and some in the storeroom. Although the street-level storeroom occupied only about 600 square feet, the entrance into it from the street was sufficiently wide that ten people could stand shoulder to shoulder inside it. The doors of the entranceway remained wide open during the unloading process. The unloaded packages were placed just inside the open doors and remained visible to the customs and DEA agents at all times. After approximately 85 percent of the cargo had been unloaded, the agents moved in and arrested appellant.

Appellant's arrest halted the unloading. As of that time, thirty-nine packages of hashish and one package of heroin remained in the container, and one package of hashish was inside appellant's van. In checking several of the packages, the agents discovered that the ones which con-

tained the narcotics had metal bands around them. The agents proceeded to examine the banded crates that were "right at the doorway", "right in the door", "intermingled right at the doorway", "right in the doorway" of the storeroom, and found seventy-five of them to contain hashish. All of the contraband packages were replaced in the container so that they could be removed the following day. In all, about 125 of the 258 consigned packages were searched, and 115 of these contained nacotics. Appellant now contends that the district court committed prejudicial error in admitting testimony concerning the seventy-five packages of contraband that were searched after they had reached the sanctuary of the warehouse doorway and that he therefore was entitled to a new trial. We disagree.

In *United States v. DeBerry,* 487 F.2d 448 (2d Cir. 1973), a leading Second Circuit case dealing with controlled deliveries, law enforcement officers were called to an air terminal in Los Angeles because a freight agent there had discovered that a suitcase en route to New York contained marijuana. After verifying the presence of the drugs, the officers closed the suitcase and sent it on its way to New York. Officers in New York, who carefully surveilled the unloading and storage of the satchel, also watched as one of the defendants claimed it and placed it in his car. Relying on *Coolidge v. New Hampshire,* 403 U.S. 443 (1971), the defendants argued that the subsequent, warrantless seizure of the drugs from the car was unlawful. Rejecting this contention, we pointed out that the drugs were lawfully seized in California, and continued:

> Even though the suitcase was then in transit, later in the luggage bin, and later still in the freight room, it

> remained legally "seized" just as much as if it were under the actual physical control of the police. In fact, except for the time that it was actually in the airplane's belly, it was under the close surveillance of the police. Thus, when the agents and police in New York removed the bag from the back seat of the car appellants were in, they were not making an initial seizure, but rather were merely reasserting control of the suitcase which had already been seized for legal purposes and which was merely being used as bait. Accordingly, no warrant was required.

Id. at 451 (footnotes omitted).

DeBerry teaches that in a typical "controlled delivery" case, the validity of the seizure is determined as of the time the drugs are first seized, not as of the time they are retaken. Having taken proper dominion over the drugs and kept them under close surveillance, the government is deemed to be in constructive possession of them, even though for purposes of identification, they are delivered to another. Other Circuits are in accord. *See, e.g., United States v. Bulgier,* 618 F.2d 472, 478 (7th Cir.), *cert. denied,* 449 U.S. 843 (1980); *United States v. Andrews,* 618 F.2d 646, 654 (10th Cir.), *cert. denied,* 449 U.S. 824 (1980); *United States v. Ford,* 525 F.2d 1308, 1312-13 (10th Cir. 1975); *United States v. Issod, supra,* 508 F.2d at 993; *see also United States v. Emery,* 541 F.2d 887, 890 (1st Cir. 1976). This means, says the Supreme Court, that "[n]o protected privacy interest remains in contraband in a container once government officers lawfully have opened that container and identified its contents as illegal." *Illinois v. Andreas,* 463 U.S. at 771.

Of course, in order for a controlled delivery to accomplish its intended purpose, there must be an actual deliv-

ery to a defendant and sufficient exercise of dominion by him to demonstrate his participation in the unlawful importation of the narcotics in question. It would be strange indeed if the very acts upon which the government relied to establish the defendant's dominion over the contraband in the instant case would deprive the government of its constructive possession of the contraband. This does not mean that the government should have the general right to make a warrantless search of a private warehouse or dwelling for the purpose of terminating a controlled delivery. We are not confronted here with an unlimited search of appellant's storeroom, but with the retaking of contraband located just inside the open storeroom doors, under direct government surveillance and constructively in the government's possession. *See United States v. Santana,* 427 U.S. 38 (1976); *United States v. Mason,* 661 F.2d 45, 46-47 (5th Cir. 1981). In view of the minimal nature of the government agents' intrusion and the need for continued surveillance, or an effective substitute therefor, if the controlled delivery of the narcotics was to be effective, *see Illinois v. Andreas, supra,* 463 U.S. at 773, *id.* at 781-82 (Brennan, J., dissenting), a reasonable argument might have been made that, under the peculiar facts of this case, there was an " 'urgent need' that 'justif[ied]' a warrantless entry." *United States v. Martinez-Gonzalez,* 686 F.2d 93, 100 (2d Cir. 1982); *see United States v. Martino,* 664 F.2d 860, 869-70 (2d Cir. 1981), *cert. denied,* 458 U.S. 1110 (1982).

However, because this troublesome argument was not made below, we do not consider it. We look instead to the Government's contention that its retaking of the warehoused narcotics yielded nothing of evidentiary value that

was not already in its possession. When the government agents began their inspection of the suspected packages, they quickly discovered that the ones which contained narcotics had metal bands around them. Without entering appellant's storeroom at all, the agents could have made a reasonably accurate approximation of how many banded crates had been removed to the storeroom. Moreover, many of the banded packages that were "right in the doorway" were readily observable from outside the storeroom. Both the agents and the jury, which had photographs of the warehoused narcotics, reasonably could conclude that these banded packages contained narcotics.

Finally, assuming for the argument that evidence of the contents of the packages in the warehouse should not have been admitted, we are convinced beyond a reasonable doubt that its admission was harmless error. As already pointed out, forty of the packages containing hashish, with a wholesale value of over $4 million, and a package of heroin, with a street value of $10-12 million, had not been removed to appellant's storeroom when they were retaken by the government agents. Under the controlled delivery rule, this retaking cannot be challenged. A reasonable jury undoubtedly would correctly conclude that the contents of the packages removed to the storeroom would be as incriminating as the contents of those that were outside the building. It is simply inconceivable that the jury in this case, or any other jury in similar circumstances, would have acquitted. *See Rose v. Clark,* 106 S. Ct. 3101, 3105 (1986); *United States v. Young,* 745 F.2d 733, 759-60 (2d Cir. 1984), *cert. denied,* 470 U.S. 1984 (1985).

Appellant's remaining arguments can be quickly disposed of. Appellant sought to establish through the

cross-examination of a Government witness that appellant's lawyer had told the witness appellant had been offered the free services of another lawyer sent to appellant by an unidentified person, and that appellant's lawyer also had given the Government witness information about appellant's assertedly innocuous prior business dealings with the consignors of the seized narcotics. Recognizing that the proposed testimony was hearsay, the district judge refused to accept it, but stated that he would be willing to reconsider his ruling after appellant testified, when the court would be "in a better position to see what first-hand information there is." When appellant then offered the testimony of the legal samaritan, the district judge stated that, in the existing posture of the case, he was unable to determine whether the probative value of permitting a lawyer to come in and testify that he had been sent by some unidentified person outweighed the possible prejudice and confusion that might result. Again, the court expressed its willingness to reconsider after some groundwork for the testimony had been laid.

Relying on *Brooks v. Tennessee,* 406 U.S. 605 (1972), appellant contends that the above rulings denied him due process by requiring him to be the first defense witness and deprived him of his right against self-incrimination. This reliance is misplaced. In *Brooks,* the Court invalidated a Tennessee statute which provided categorically that a defendant desiring to testify "shall do so before any other testimony for the defense is heard by the court trying the case." The district court applied no such rule in the instant case. Indeed the court did not compel appellant to testify at all. It merely refused to accept the proffered testimony of other witnesses until a proper foundation was laid. There was nothing erroneous about this.

See United States v. Truesdale, 400 F.2d 620, 623-24 (2d Cir. 1968). The rule properly applicable to the situation in the instant case is set forth in *Geders v. United States*, 425 U.S. 80 (1976):

> Our cases have consistently recognized the important role the trial judge plays in the federal system of criminal justice. "[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." *Quercia v. United States*, 289 U.S. 466, 469 (1933). A criminal trial does not unfold like a play with actors following a script; there is no scenario and can be none. The trial judge must meet situations as they arise and to do this must have a broad power to cope with the complexities and contingencies inherent in the adversary process. To this end, he may determine generally the order in which parties will adduce proof; his determination will be reviewed only for abuse of discretion.

Id at 86. *See also* Fed. R. Evid. 611(a).

Finally, we see no error in the admission of testimony by a Government rebuttal witness that he had dealt with appellant in a series of drug transactions during the year preceding appellant's arrest. Such evidence was admissible to prove appellant's knowledge and intent in the transaction which led to his conviction. *United States v. Santiago*, 528 F.2d 1130, 1134 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); *United States v. Brettholz*, 485 F.2d 483, 487 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974). Moreover, it was for the jury, not this Court, to determine the credibility of the witness who provided the challenged evidence. *Glasser v. United States*, 315 U.S. 60, 80 (1942).

The judgment of conviction is affirmed.

BEST AVA

KEARSE, *Circuit Judge*, dissenting:

With all due respect, I dissent from the majority's ruling that the district court did not err in refusing to suppress the evidence seized from the warehouse of defendant Braj Nandan Singh. The majority apparently concludes that the entry into the warehouse, the search of crates therein, and the seizure of those crates, all without a warrant, did not violate Singh's rights under the Fourth Amendment to the Constitution. This ratio decidendi is not that used by the district court to deny the suppression motion; the district court found the entry, search, and seizure unlawful but found that suppression should be denied on the basis of two exceptions to the exclusionary rule. Nor is the majority's rationale the rationale advanced by the government in support of the district court's decision; the government does not argue that the entry, search, and seizure were lawful but rather argues that suppression was properly denied because of exceptions to the exclusionary rule, albeit not the same pair of exceptions invoked by the district court. I disagree with all three rationales and, for the reasons below, believe that the entry and search of Singh's warehouse violated Singh's Fourth Amendment rights, that the warrantless seizure of evidence from the warehouse was unlawful, and that no exception to the exclusionary rule justified the district court's refusal to suppress the unlawfully seized evidence.

A. *Neither the Facts Nor Fourth Amendment Principles Warrant the Majority's Conclusion that the Entry, Search and Seizure Were Lawful.*

The key factual premise of the majority's view that the agents did not violate Singh's privacy interest in the

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storehouse to any significant degree is that they merely searched "the banded crates that were 'right at the doorway', 'right in the door', 'intermingled right at the doorway', 'right in the doorway' of the storeroom." Majority opinion *ante* at 3. The majority felt it was "not confronted here with an unlimited search of appellant's storeroom, but with the retaking of contraband located just inside the open storeroom doors . . .," *id.* at 5, and with a search that was a "minimal . . . intrusion," *id.* at 6. An affirmance on this basis is supported neither by the factual findings of the district court nor by Fourth Amendment doctrine.

The picture painted by the majority is at odds with that drawn by the district court in its findings of fact. In part this is doubtless because all of the "doorway" phrases quoted by the majority come from the agents' testimony at trial, after the district court had found the agents' entry unlawful, not from anything that was presented to the court on the pretrial motion to suppress. In any event, the findings and record below indicate that a relatively thorough warrantless search was indeed made. Far from finding that the crates searched by the agents were right in or at the doorway to the storehouse, the court found that "[t]he warehouse appeared filled with crates and sacks of which a 'majority' were from the container." Memorandum and Order dated October 1, 1985 ("October 1 Order"), at 7. This finding was virtually compelled by the record on the suppression motion. Immediately after their entry and search of the warehouse, the agents sought a warrant to search that building further and to search Singh's home and his store. In support of this warrant application, Drug Enforcement Administration ("DEA")

Special Agent Thomas J. Sharkey submitted an affidavit ("Sharkey Aff.") in which he stated, *inter alia,* that "the storehouse . . . was literally filled with burlap-wrapped wooden crates and burlap sacks, the majority of which appeared to have come from the container." (Sharkey Aff. ¶ 16.) Thus, the majority's finding that the crates searched were just at the doorway of the warehouse is contradicted by the district court's finding and the virtually contemporary sworn statement of Sharkey.

Further, the majority finds that not all of the crates unloaded from the container were searched before a warrant was obtained. Though there is some support for that proposition in the Sharkey affidavit, the district court noted that there was confusion in the record, and it resolved the issue in favor of finding that "[a]ll of the crates identified as coming from the container were opened without a search warrant." October 1 Order at 7. This finding was supported not only by a statement in the Sharkey affidavit that appeared to describe the contents of all the crates, but also by the government's memorandum in opposition to Singh's motion to suppress, which stated that the agents had, prior to obtaining a warrant, seized "the packages that had been carried into the storehouse," (Government's Memorandum of Law in Opposition to Motion To Suppress, July 31, 1985, at 5). The district court's findings of fact on a suppression motion are to be upheld unless they are clearly erroneous. *See, e.g., United States v. Ramirez-Cifuentes,* 682 F.2d 337, 344 (2d Cir. 1982); *United States v. Chiarizio,* 525 F.2d 289, 292-93 (2d Cir. 1975). The court's finding that all of the crates from the container had been searched without a warrant was not clearly erroneous and should not have been disregarded.

Finally, far from making a "minimal . . . intrusion," Majority opinion *ante* at 6, by merely reaching into the doorway of the warehouse to search the 209 crates that had just been unloaded from the container into the warehouse, the agents must have conducted a reasonably thorough search of the warehouse, for the Sharkey affidavit argued that the results of that search furnished probable cause for the issuance of a warrant to search Singh's home and store. Thus, after noting that in his experience importers of large shipments of controlled substances maintained documents and large amounts of money relating to their operations, Sharkey stated that "[n]o documents or monies were found inside the storehouse by U.S. Customs agents who had examined the crates inside the storehouse." (Sharkey Aff. ¶ 20.) Sharkey stated that it was probable that documents, money, etc., were either at Singh's store or his residence "[b]ecause there were no documents inside Singh's storehouse." (*Id.*) No good faith representation to this effect could have been made with respect to a warehouse "literally filled" with crates and sacks, (Sharkey Aff. ¶ 16), without a relatively thorough search.

Even were the majority correct in its view that there was no thorough search but only a minimal intrusion into Singh's premises, however, I know of no Fourth Amendment principle that accepts this as a basis for finding that the entry did not violate Singh's Fourth Amendment rights. *Cf. Katz v. United States,* 389 U.S. 347, 356-57 (1967) (in the absence of judicial authorization, the "Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end."). For business premises

as well as residences, *see, e.g., G.M. Leasing Corp. v. United States,* 429 U.S. 338, 353 (1977); *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920), "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York,* 445 U.S. 573, 590 (1980).

Nor do I see support in Fourth Amendment doctrine for the majority's ruling that the agents were entitled to enter the storehouse either because they had made a seizure of the container at the border or on the theory that they had "constructive possession" of the crates in the container thereafter. Preliminarily, I must note that the majority appears not to differentiate between distinct parts of the individual's privacy expectation. The expectation includes at least the notion that an intruder will not enter his premises. It may also include the notion that an outsider will not see the activities or contents of his premises. The latter expectation is easily lost if the individual exposes interior premises to ordinary view, and this loss may allow the agents to use what they have seen to show a magistrate that there is probable cause for a warrant to enter and search, *see, e.g., United States v. Taborda,* 635 F.2d 131, 139, (2d Cir. 1980); but merely making the interior of a building visible to an outsider does not constitute an invitation to enter. Here, the district court found that Singh had kept his warehouse locked—a fact mentioned by the Sharkey affidavit—and that Singh had a reasonable expectation of privacy in that building. The court found that that expectation was not lost by Singh's opening the doors of the warehouse to permit transport of the crates from the container into the warehouse; though the open doors permitted sur-

veillance, they did not invite "physical invasion such as the agents' entry involved." October 1 Order at 11. The government has not challenged these findings and I have found no basis in the record for disturbing them.

Given the various aspects of an individual's expectation of privacy, the facts that agents had searched one crate and that thereafter some or all of the crates remained visible did not ensure the agents' retention of possession of the crates. Obviously the agents did not have actual possession since they had allowed the trucker to take physical possession. Nor, since Singh had a legitimate expectation that no uninvited person would enter his warehouse, did the agents have constructive possession once the crates were moved inside the warehouse. The majority's conclusion that the agents had the right to enter the warehouse to seize the crates because they had constructive possession of the crates puts the analytical cart before the horse. The traditional concept is that a person has constructive possession of property if he has the power to exercise dominion and control over it. *See, e.g., United States v. Damsky,* 740 F.2d 134, 139 (2d Cir.) (defendant had constructive possession of narcotics in vehicle over which he had dominion and control), *cert. denied,* 469 U.S. 918 (1984); *United States v. Schocket,* 753 F.2d 336, 340 (4th Cir. 1985) (defendant had constructive possession of narcotics in his own room though he was absent). Since the warehouse was an area in which Singh had, and had not lost, his expectation of privacy, the agents had no right to enter it; they thus lacked dominion and control over items inside the warehouse and hence lacked constructive possession of them. The mere visibility of the crates did not give the agents either dominion and control over them or the right to enter the premises.

The irony found by the majority in the possibility that "the very acts upon which the government relied to establish the defendant's dominion over the contraband . . . [c]ould deprive the government of its constructive possession of the contraband," Majority opinion *ante* at 5, is irony miscast. The controlled delivery device is used to "*identif*[*y*]" the "person . . . taking possession of and asserting dominion over" the package. *Illinois v. Andreas,* 463 U.S. 765, 769 (1983) (emphasis added). Thus, the majority's interpretation of *Andreas* as authorizing the agents' entry into Singh's warehouse seeks to extend the holding in that case far beyond its facts. There the agents had made a controlled delivery of a container, previously opened at the border and found to contain narcotics, to Andreas, who took the container into his apartment. One agent then went to get a search warrant while the other kept the apartment under surveillance. Before the warrant could be obtained, Andreas left his apartment with the container, whereupon he was arrested and the container was seized. It was thereafter opened without the warrant having issued. The Supreme Court ruled that the opening of the container, previously opened in the border search, did not violate Andreas's Fourth Amendment right of privacy *in the container, the Court did not suggest that it would have been permissible for the agents to go into Andreas's apartment to seize the container. Accord United States v. Saint Prix,* 672 F.2d 1077, 1082 n.10 (2d Cir.) (" 'border search' exception does not justify searches of homes or business establishments"), *cert. denied,* 456 U.S. 992 (1982).

Finally, I find the majority's reliance on *United States v. DeBerry,* 487 F.2d 448 (2d Cir. 1973), unpersuasive since

the agents there seized the suitcase, previously subjected to a border search, from a car. Fourth Amendment doctrine has long recognized that a person has a stronger privacy expectation in a private building than in a vehicle:

> "[T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of Government, as recognizing a *necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile,* for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

California v. Carney, 471 U.S. 386, 390 (1985) (quoting *Carroll v. United States,* 267 U.S. 132, 153 (1925)) (emphasis mine). The other authorities cited by the majority are no more apposite. For example, *United States v. Bulgier,* 618 F.2d 472, 478 (7th Cir.), *cert. denied,* 449 U.S. 843 (1980), involved agents reopening a piece of luggage while it was still at the airport; *United States v. Andrews,* 618 F.2d 646, 654 (10th Cir.), *cert. denied,* 449 U.S. 824 (1980); *United States v. Ford,* 525 F.2d 1308, 1312-13 (10th Cir. 1975); and *United States v. Issod,* 508 F.2d 990, 993 (7th Cir. 1974, *cert. denied,* 421 U.S. 916 (1975), all involved on-the-spot arrests of the person who took delivery of the item in the airport.

Though the majority states that it does not intend to give the government the "general right to make a warrantless search of a private warehouse or dwelling for the purpose of terminating a controlled delivery," Majority opinion *ante* at 5, that seems to be precisely the effect of its rul-

ing. No reasonable argument could be advanced that there were exigent circumstances here. No reason appears why the agents could not simply have arrested Singh and his helpers, locked and guarded the warehouse, and obtained a search warrant before entering. There was no evidence that anyone was inside after the arrests were made; there was ample advance time to gather enough law enforcement agents to make arrests, secure the premises, and obtain a warrant. Indeed, in its brief on appeal, the government describes this course as one of the "practical choice[s]" that were available to the agents. (Government's brief on appeal at 39.) I would conclude that neither the law nor the facts support the majority's ruling that the agents' entry into Singh's warehouse and search of the crates there without a warrant were lawful.

B. *No Exception to the Exclusionary Rule Justified the Refusal To Suppress*

Evidence obtained through an unconstitutional search and seizure is generally excluded from evidence in order to deter law enforcement officials from ignoring the Fourth Amendment's warrant requirement. *See Wong Sun v. United States,* 371 U.S. 471, 484-85 (1963). There are three commonly advanced exceptions to the exclusionary rule, *i.e.*, the "attenuation," the "independent source," and the "inevitable discovery," doctrines, *see United States v. Crews,* 445 U.S. 463, 470 (1980), that may be applicable to avoid the suppression of the unlawfully obtained evidence. The "attenuation" doctrine may be applied when the causal link between the unlawful act and the seizure of the evidence was so long or tortuous that suppression of the evidence is unlikely to have the effect of deterring future vio-

lations of the same type. *See, e.g.*, 3 W. LaFave, *Search and Seizure* § 11.4(a), at 615-16 (1978); *United States v. Ceccolini*, 435 U.S. 268 (1978). The "independent source" doctrine may be applied when the evidence was obtained by means of an untainted act and hence there is no real "but for" connection between the illegality and the acquisition of the evidence. *See, e.g., United States v. Crews*, 445 U.S. at 475 (evidence obtained through untainted information gained prior to illegality should not be suppressed). The "inevitable discovery" doctrine is, in a sense, a variation of the independent source doctrine, and has been applied when the court believed that, in the absence of the illegality, law enforcement officers would plainly have come upon the evidence in the course of their lawful operations. *See, e.g., United States v. Andrade*, 784 F.2d 1431, 1433 (9th Cir. 1986) (unlawfully seized evidence that would inevitably have been discovered in a lawful routine inventory search should not be suppressed). In the present case, each of these three doctrines has been invoked by the district court or the government, or both.

In denying Singh's motion to suppress the evidence found in the warehouse, the district court appears to have relied on the attenuation and inevitable discovery exceptions. Its rationale was stated as follows:

> [A]lthough the agents' entry into the warehouse without a warrant appears to have been illegal, it cannot be said that evidence with respect to the contents of those packages which were inside the warehouse was obtained as a result of this illegality. The container in its entirety had already been seized, and its contents would inevitably have had to be inventoried and inspected before its release to anyone. Whether simply as a matter of causation or application of the inevitable discovery rule, no suppression is required in the

> circumstances here presented by reason of the agents' wrongful entry into the warehouse.

October 1 Order at 11 (footnote omitted). The government, on the other hand, expressly disclaims reliance on the inevitable discovery doctrine but invokes the attenuation and independent source doctrines. I am unable to conclude that any of these exceptions justified refusing to suppress the evidence seized from the warehouse.

As to the attenuation doctrine, I have considerable difficulty with the view that the causal link here between the illegality and the discovery of the evidence was anything other than short, straight, and unleavened. The agents entered the warehouse unlawfully and promptly conducted their warrantless, unlawful search of the crates that had been in the shipping container. They thereby found some two tons of hashish. None of the crates that were moved into the warehouse had previously been searched; hence the agents did not know what was in any crate until they searched. The discovery of the narcotics in 75 of the 209 crates in the warehouse was the direct result of the unlawful search.

I see no greater merit in the government's contention that suppression was properly denied on the theory that the agents had an independent source for their discovery of the narcotics in the warehouse. In support of this contention, the government argues that the agents had already "obtained" that evidence in the initial border search of the shipping container. This argument vastly overstates the case. What the agents had gained in the initial search of the single crate they opened at the port was knowledge of the contents of that one crate and prob-

able cause to believe that other crates contained narcotics. They did not acquire—prior to their unlawful search—either knowledge or evidence of the contents of the crates in the warehouse. Their actual knowledge that crates taken from the container to the warehouse contained narcotics was obtained during and by means of the unlawful search. I would conclude that the independent source doctrine is inapplicable.

Finally, I would reject the district court's invocation of the inevitable discovery doctrine. The court's rationale was that the crates inside the warehouse had been seized when the agents seized the container and that the container's "contents would inevitably have had to be inventoried and inspected before its release to anyone." Had the shipping container and its contents remained intact, or had the contents remained in the constructive custody of the agents, I would agree that they would have been inventoried and the narcotics discovered. But the contents of the shipping container did not remain intact or within the agents' lawful reach. As the agents stood and watched, some 80% of the crates in the container were removed from the container and placed in an area into which the agents had no right to enter. In allowing this to occur, the agents yielded dominion and control of those crates, and there was no longer a basis on which to expect them to be inventoried.

Nor do I see any other sound basis for admitting the warehouse evidence. It is true that since the agents had probable cause to believe that the crates taken from the container to the warehouse contained narcotics, they could surely have obtained a search warrant that would

have led to the discovery of the narcotics. The Fourth Amendment, however, required that the agents obtain the warrant before entering and searching the warehouse, and there apparently was no reason why the agents could not have secured the warehouse and searched it after they obtained a warrant. The government has made no argument, either here or in the district court, based on any supposed exigency in the circumstances. Rather, the government tells us that the agents simply viewed it as a "practical choice . . . whether to close and secure the doors of the storehouse and obtain a search warrant prior to recovering the crates or whether to reclaim those items that the agents considered were already seized by them." (Government's brief on appeal at 39.) This is little better than an argument that, as a matter of practicality, if there is probable cause to obtain a warrant, there is no point in waiting for one. Such selection of a "practical choice" that violates reasonable expectations of privacy, in preference to the principled choice that does not, is precisely what the exclusionary rule is designed to deter. Acceptance of the government's "practical choice" argument can only encourage warrantless entries into private homes and buildings at the end of any controlled delivery of contraband or evidentiary items, or indeed encourage such entry whenever there is probable cause for believing that evidence will be found within. In short, upholding the refusal to suppress on this basis has the effect of " 'sanction[ing] the very misconduct the exclusionary rule was intended to proscribe.' " *United States v. Alvarez-Porras*, 643 F.2d 54, 65 (2d Cir. 1981).

In sum, I agree with the district court that the warrantless entry, search, and seizure were unlawful, but I

conclude that no exception to the exclusionary rule justified the court's refusal to suppress the evidence seized in that search.

C. *The Harmless Error Analysis*

It may well be, as the majority concludes, that, since the evidence against Singh included a ton of hashish and 20 pounds of heroin found in crates that remained outside the warehouse, the jury would have convicted Singh even if the evidence seized from the warehouse had been suppressed. I am not as convinced as the majority that any error in failing to suppress was harmless, however, for that evidence must be considered in light of Singh's defense at trial.

As the *Illinois v. Andreas* Court noted, "the mere fact that the consignee takes possession of the container would not alone establish guilt of illegal possession or importation of contraband. The recipient of the package would be free to offer evidence that the nature of the contents w[as] unknown to him . . . ." 463 U.S. at 769 n.3. The entire thrust of Singh's defense at trial was that he did not know that narcotics were in the crates shipped to him, that he had somehow been a dupe for others. He testified in his own behalf that he was ignorant of the unlawful contents of the crates and called two other witnesses whose testimony was intended to buttress that position.

In its summation, the government belittled Singh's defense by pointing out that some two tons of hashish, worth $8 million wholesale, had been found inside the warehouse and arguing that it defied reason to believe that anyone would allow such a large quantity of narcotics to

be placed in Singh's warehouse without Singh's knowledge. The prosecutor framed the issue this way:

> The issues in this case are very simple. The issues isn't [*sic*] about whether or not Mr. Singh imported these drugs. He imported them. . . . The issue isn't, did he have possession of them. He had possession of them. . . .
>
> What is his defense? His defense is, well, I didn't know. I didn't know. I have no idea how all of this Hashish and heroin got into my shipment.

Urging the jury to use its reason and common sense, the prosecutor asked:

> Was this hashish going to walk out of this storeroom and go to some other owner? Or . . . [was] somebody going to break into the storeroom . . . and find the crates and gather them back up and run off with them without [Sigh] knowing?

Given the nature of the defense and the government's use of the fact that narcotics were found in the warehouse to rebut it, I am unprepared to say that it is clear beyond a reasonable doubt, *see Chapman v. California*, 386 U.S. 18, 24 (1967), that the refusal to suppress was harmless.

I would vacate the judgment of conviction and remand for a new trial.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

CR-85-00370

UNITED STATES OF AMERICA

— against —

BRAJ NANDAN SINGH,

Defendant.

MEMORANDUM AND ORDER

(Filed October 2, 1985)

SIFTON, District Judge

Defendant, Braj Singh, is charged in a five-count indictment with conspiracy, importation, and possession of hashish and heroin. The matter is currently before the Court on defendant's motion pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure for an order seeking the suppression of certain evidence seized on June 5, 1985, in a variety of warrantless searches as well as pursuant to two search warrants issued June 5 and June 12, 1985.

Pursuant to agreement between the parties, no hearing was conducted on these motions, and the Court has been left to glean the pertinent facts from the affidavit of Special Agent Thomas Sharkey of the Drug Enforcement Agency dated June 5, 1985, used to obtain both of the search warrants, a recitation of the facts included in a Memorandum of Law offered by the Government in opposition to the motion, and an affidavit of Juris G. Cederbaum, counsel for the defendant, dated August 1, 1985. Based on the factual statements made in those papers, de-

fendant's motion must be denied. What follows sets for the essential findings of fact that require this determination as required by Rule 12(e) of the Federal Rules of Criminal Procedure.

On May 23, 1985, it appears that a twenty-foot long shipping container arrived at Port Newark,[1] New Jersey, upon a cargo vessel named the "Barzan Z" from India. The container was described in the ship's manifest as containing 258 packages of Indian foodstuffs weighing in excess of 21,000 pounds. The shipment was described as having originated in Bombay and the container was consigned to "Little India of Queens," 73-08 Roosevelt Avenue, Jackson Heights, New York.

On June 4, 1985, the container was the subject of a routine search by U.S. Customs officials. During the period of delay between the date of arrival of the vessel and the date of the search, defendant's trucker, Lazio Trucking Inc., and a Customs broker, Import/Export Service of N.J., Inc., made several unsuccessful attempts to pick up the container. In addition, it appears that the container was the subject of a Department of Agriculture quarantine. The trucker apparently had better luck in picking up two other containers, one described as containing rice, apparently from the same shipment. None of these circumstances persuades me that the search was anything other than a routine Customs search.

During the course of the search of the container in a secure, fenced-in Customs area, the inspectors discovered a number of wooden crates wrapped in burlap and secured by metal bands as well as a number of burlap sacks. They removed a wooden crate, opened it, and found approxi-

mately 50 pounds of a greenish substance which, when field tested, they identified as hashish.

Following this discovery, the Customs agents alerted the Drug Enforcement Agency which decided to re-wrap and replace the crate which had been opened and to effect a controlled delivery of the entire container to its consignee in a effort to apprehend those responsible for the illegal importation. Thereafter, the crate and container were repacked and claimed on June 4, 1985, by a truck driver employed by the Lazio Trucking Co., who arrived with the appropriate documents to pick up the container. The truck driver was interviewed by Customs agents and advised that he has been instructed to pick up the container and deliver it to the trucking company's terminal in Secaucus, New Jersey. The driver was permitted to haul the container to the terminal with a Customs agent in the cab of the truck with him, followed by teams of surveilling agents. At the Lazio terminal the container was unhooked from the truck and left in an open lot under continued surveillance by government agents pending the receipt of further instructions from the consignee concerning delivery.

On June 5 at around 5:30 p.m. the trucking company was called by the defendant, who had previously been identified by trucking company representatives as the person who had hired the trucker to pick up the container. The defendant requested delivery that evening of the container to his store, Little India of Queens, or, if it was closed, to defendant's warehouse at 47-05 77th Street in Queens. Defendant agreed to pay any additional expenses required by the after-hours delivery.

At around 7:15 p.m. the same day, the container was driven, under surveillance by Customs agents, to the store which was found to be closed and locked. Thereafter, still under surveillance, the truck was driven to the warehouse, which was also locked. The driver then placed a call from a street phone to a number apparently furnished him earlier by the defendant, which resulted in the appearance at the warehouse of the defendant and another individual, Jaswant Singh. The defendant, after discussions with the truck driver, then entered a red van, registered to him at 73-08 Roosevelt Avenue, the address for Little India, which was parked in front of the warehouse so that the container could be left on the street directly opposite the warehouse entrance. When the unloading of the container was completed, the driver left in his tractor.

Over the next two hours, under surveillance by Customs and DEA agents, the defendant and four companions unloaded numerous crates and sacks from the container. Some of the packages were placed in the red van, which was now parked across the street from the warehouse. Others were taken into the warehouse into which the surveillance agents could look through the open loading doors.

During the unloading process, two New York City police officers appeared in response to an unrelated burglary call in the neighborhood and spoke to the defendant. These officers, when stopped by the surveillance agents, informed them that defendant had identified himself as the owner of the Little India store, specializing in Indian foodstuffs, and of all of the merchandise being unloaded from the container.

At around 10:00 p.m. defendant and his companions were arrested.

Following the arrest, warrantless searches were conducted of the container, the van, and the warehouse. Inside the container the agents found 40 burlap-wrapped wooden crates which were thereafter opened without a warrant. Thirty-nine of these crates were found to contain hashish. One was found to contain 9 kilograms of heroin.

Inside the van agents discovered 9 crates, one of which was already opened and was observed to contain hashish. Whether the other 8 crates were ever opened is not apparent from the information submitted to the Court by the parties on the motion. Presumably they were, following the seizure of the van and its contents as a result of discovery of its use as a vehicle for transporting narcotics.

The agents also entered the warehouse without a search warrant. The warehouse appeared filled with crates and sacks of which a "majority" were from the container. All of the crates identified as coming from the container were opened without a search warrant. Seventy-five of these crates were found to contain hashish. The balance of some 134 crates were found to contain foodstuffs.

Following defendant's arrest, he advised the arresting agent that he owned the Little India store and resided at Apartment 2T, 415 Beverly Road, Brooklyn. He stated that he received 4 or 5 shipments of foodstuffs from India each year and kept the shipments either in his store or in his warehouse.

Based on all of the foregoing information, together with their expert opinion that evidence of defendant's present and prior drug importations could be found at such loca-

tions, the arresting agents next applied for search warrants for the defendant's store, the warehouse, and residence. Although the affidavit in support of the application itself suggested that all packages from the container in the warehouse had already been searched, the affidavit confusingly stated that the warrant was necessary to examine "the balance of the packages that had been in the container."[2] In addition, the affidavit sought leave to search the warehouse and store for packages from earlier shipments and all of the locations for documents, money, and paraphenalia associated with narcotics trafficking. Although the warrants themselves were not furnished to the Court, there is apparently no dispute that two separate warrants authorizing these searches were issued on June 5 and June 12, 1985, or that searches were thereafter conducted. Neither side informed the Court prior to its announced decision on this motion what, if anything, was discovered as a result of these searches pursuant to warrants. At the trial of this matter, no evidence from any of these searches was introduced by the prosecution.

DISCUSSION

Despite defendant's argument to the contrary, the Court is persuaded that the initial search and seizure of the container and its contents resulted from an entirely routine Customs search at the border. The delay in making the search, the difficulties which the broker and trucker had in effecting release of the container, the presence of some involvement by the Department of Agriculture, and the manner in which other shipments from the same vessel were handled hardly suffice to establish the proposition urged by defendant that the government agents delayed the shipment for investigative purposes having nothing to do with Cus-

toms inspection. On the contrary, the delays and involvement of the Department of Agriculture appear to have been entirely normal aspects of the process of unloading and inspecting a large quantity of cargo from a single ship.

Moreover, since the entire container was legally seized at the border and remained in the effective custody of government agents, as a result of their constant surveillance, through the time defendant was arrested, there can be no question that the government agents retained the right to open the individual packages within the container without a further warrant except as might be necessary to enter places into which the packages were taken upon removal from the container.

With regard to the packages removed from the container to the van, the van itself appears to have been appropriately searched because of the arrest of its driver and registered owner, under the automobile search exception to the warrant requirement. *New York v. Belton,* 453 U.S. 454 (1981); *United States v. Chadwick,* 433 U.S. 1 (1977). As already noted the packages themselves were still effectively "seized" and in the custody and control of the government agents as a result of the earlier Customs examination. Hence, quite apart from the fact that one package was open and visibly displayed contraband, the packages in the van could be opened under the authority of the initial border search. *See Illinois v. Andreas,* — U.S. —, 103 S.Ct. 3319 (1983). So too, the entrance of the searching officers into the container to retrieve the packages left there after the arrests and opening of those packages simply completed the seizure of the container and its contents made at Port Newark incident to the discovery of hashish within the container during the border inspection. *Illinois v. Andreas, supra.*

The agents' entry into the warehouse without a warrant, however, presents different issues. The only argument made initially by the Government to justify its agents' conduct in entering the warehouse without a warrant was that the contents of the warehouse had been "knowingly exposed to the public" because the doors were open during the unloading process, thereby affording surveilling agents a view of what was inside. In support of this argument, the Government cites *Katz v. United States,* 389 U.S. 347 (1967). Such exposure, however, hardly suffices to establish that defendant had no legitimate expectation of privacy in the premises, which according to the surveilling agents' testimony was kept locked except during the unloading process and was at no time opened to physical invasion such as the agents' entry involved.[3] However, although the agents' entry into the warehouse without a warrant appears to have been illegal, it cannot be said that evidence with respect to the contents of those packages which were inside the warehouse was obtained as a result of this illegality.[4] The container in its entirety had already been seized, and its contents would inevitably have had to be inventoried and inspected before its release to anyone. Whether simply as a matter of causation or application of the inevitable discovery rule, no suppression is required in the circumstances here presented by reason of the agents' wrongful entry into the warehouse.

While it is quite unclear whether any additional evidence was seized pursuant to the search warrants subsequently issued, there appears no ground to suppress any evidence obtained pursuant to these searches. While a persuasive case can be made for the proposition that the affidavits failed to demonstrate probable cause to search

the store, warehouse, and residence for evidence of the instant and earlier shipments, the fact that a magistrate was persuaded to issue the warrants is dispositive since the basis for the belief that the warrants were legal is sufficiently substantial to justify the executing agents in relying on them. United States v. Leon, — U.S. —, 103 S.Ct. 3405 (1984).

Finally, defendant seeks to suppress statements made by him after his arrest solely on the ground that they are tainted by illegality. Since the statements appear to have preceded the warrantless entry into the warehouse, it can hardly be said that the seizures led to the obtaining of the admissions obtained.

For the reasons stated, defendant's motion to suppress evidence is granted in part and denied in part.

The clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

Dated: Brooklyn, New York
October 1, 1985
/s/ Charles B. Sifton

FOOTNOTES

1 Defendant argues, based on a description of the point of unloading as "Port Elizabeth" by the Government lawyer, that the container was moved from one location to another before being picked up for delivery to the consignee. No other evidence has been offered to support this contention. On the trial of the matter it appears that the container was, in fact, moved from one pier to another to accommodate the shipping companies involved, but that the con-

tainer remained at all times subject to the control of U.S. Customs.

2 After the Court announced its decision denying his motion to suppress, defendant sought to argue that the Court should infer that some of the crates opened during the warrantless search were crates already in the warehouse rather than crates removed from the container. While the evidence as to precisely which crates were opened prior to the obtaining of a warrant is sparse, the Court infers that only crates removed from the container, although perhaps not all of those crates, were searched. At the trial of this matter, it appears that the crates in the container were numbered, lending further credence to the agents' allegations that only crates from the container were searched.

3 The Government makes no argument that initial entry into the warehouse was justified by exigent circumstances. All participants in the unloading process were arrested. No evidence exists that others were inside the warehouse or that the agents could not have effectively prevented the removal of anything from the warehouse, had anyone attempted to remove anything while a search warrant was obtained. Cf. *United States v. Farra,* 725 F.2d 197 (2d Cir. 1984).

4 A different issue would be presented if, on entering the warehouse, the agents had found evidence of prior shipments which obviously would have been the product of the illegal entry. Agents would, of course, be well advised in a controlled delivery situation to obtain warrants to follow the seized goods into offices or residences, not only because of the privacy interests at stake but also because of the likelihood that such entries will produce evidence beyond what has already been seized which would have to be suppressed in the absence of a warrant.